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| DISTRICT OF NEVADA | | |
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JERAMIE CARLSSON,)

Plaintiff,

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BYRON CRAGG, *et al.*

Defendants.

3:14-cv-00091-MMD-VPC

REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE

August 28, 2014

This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is plaintiff's application to proceed *in forma pauperis* (#1) and *pro se* civil rights complaint (#1-1).¹ The court has thoroughly reviewed the record and recommends that plaintiff's application to proceed *in forma pauperis* be granted, and that count I of plaintiff's complaint should proceed.

I. Plaintiff's Application to Proceed *In Forma Pauperis*

Based on the financial information provided with plaintiff's application to proceed *in forma pauperis*, the court finds that plaintiff is unable to pay the filing fee in this matter. Accordingly, the court recommends that plaintiff's application to proceed *in forma pauperis* be granted.

II. Screening Pursuant to 28 U.S.C. § 1915

Applications to proceed *in forma pauperis* are governed by 28 U.S.C. § 1915, which “authorizes the court to dismiss an [*in forma pauperis*] action that is frivolous or malicious.”

¹ Refers to the court's docket number.

1 *Franklin v. Murphy*, 745 F.2d 1221, 1226 (9th Cir. 1984) (citing 28 U.S.C. § 1915(a) (citing 28
 2 U.S.C. § 1915(d)). While in this case the plaintiff is in the custody of the Nevada Department of
 3 Corrections, this provision applies to all actions filed *in forma pauperis*, whether or not the plaintiff
 4 is incarcerated. *See Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc); *see also Calhoun
 5 v. Stahl*, 254 F.3d 845 (9th Cir. 2001) (per curiam).

7 28 U.S.C. § 1915 provides: “the court shall dismiss the case at any time if the court
 8 determines that . . . the action or appeal (i) is frivolous or malicious; (ii) fails to state a claim upon
 9 which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from
 10 such relief.” 28 U.S.C. § 1915(e)(2)(B)(i)-(iii). Dismissal of a complaint for failure to state a claim
 11 upon which relief may be granted is provided for in Federal Rule of Civil Procedure 12(b)(6), and
 12 this court applies the same standard under Section 1915(e)(2) when reviewing the adequacy of a
 13 complaint or amended complaint. *See Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000) (citation
 14 omitted). Review under Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v.
 15 Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000).

18 In reviewing a complaint under this standard, the court must accept as true the allegations of
 19 the complaint in question, *Hosp. Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 740 (1976),
 20 construe the pleading in the light most favorable to plaintiff, and resolve all doubts in the plaintiff’s
 21 favor, *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). Allegations in *pro se* complaints are held to
 22 less stringent standards than formal pleadings drafted by lawyers, and must be liberally construed.
 23 *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (per
 24 curiam); *see also Hamilton v. Brown*, 630 F.3d 889, 893 (9th Cir. 2011); *Hebbe v. Pliler*, 627 F.3d
 25 338, 342 (9th Cir. 2010); *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

1 A complaint must contain more than a “formulaic recitation of the elements of a cause of
2 action;” it must contain factual allegations sufficient to “raise a right to relief above the speculative
3 level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “The pleading must contain
4 something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally
5 cognizable right of action.” *Id.* (quoting 5 C. Wright & A. Miller, Federal Practice and Procedure §
6 1216, at 235-36 (3d ed. 2004)). At a minimum, a plaintiff should state “enough facts to state a claim
7 to relief that is plausible on its face.” *Id.* at 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678
8 (2009).

9
10 “To sustain an action under Section 1983, a plaintiff must show (1) that the conduct
11 complained of was committed by a person acting under color of state law; and (2) that the conduct
12 deprived the plaintiff of a federal constitutional or statutory right.” *Wood v. Ostrader*, 879 F.2d 583,
13 587 (9th Cir. 1989). Section 1983 does not provide a cause of action for violations of state law. *See*
14 *Galen v. County of Los Angeles*, 477 F.3d 652, 662 (9th Cir. 2007).

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16 **III. Plaintiff’s Complaint**

17 Plaintiff has filed a civil rights complaint pursuant to 42 U.S.C. § 1983 (#1-1). In count I,
18 plaintiff alleges that on or about May 9, 2012, he was approached by several Reno police officers
19 and fled on foot. *Id.* at 4. Defendant police officers Byron Cragg, Ryan Connelly, K.G. Gallop, J.
20 Johnson, and S.D. Tracy pursued him. *Id.* When plaintiff began to climb a chain-link fence, an
21 officer deployed a “less than lethal” round that hit plaintiff in the buttocks and hips and immobilized
22 him. *Id.* As he lay on the ground, not resisting, John Doe officer deployed a K-9 dog that bit
23 plaintiff multiple times. *Id.* at 5. Gallop handcuffed plaintiff, and then all defendants began to beat
24 plaintiff with their fists and feet. *Id.* While plaintiff laid restrained, face-down and semi-conscious,
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1 defendants Gallop and Johnson lifted plaintiff up by his arms, and Cragg jumped on plaintiff's right
2 arm, breaking it. *Id.* Defendants then continued to beat plaintiff with their hands and feet. *Id.*
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4 The Eighth Amendment prohibits the imposition of cruel and unusual punishments and
5 "embodies broad and idealistic concepts of dignity, civilized standards, humanity and decency."
6 *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). "[W]henever prison officials stand accused of using
7 excessive physical force in violation of the [Eighth Amendment], the core judicial inquiry is . . .
8 whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and
9 sadistically to cause harm." *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992); *see also Whitley v.*
10 *Albers*, 475 U.S. 312, 320-21 (1986); *Watts v. McKinney*, 394 F.3d 710, 711 (9th Cir. 2005);
11 *Martinez v. Stanford*, 323 F.3d 1178, 1184 (9th Cir. 2003); *Marquez v. Gutierrez*, 322 F.3d 689,
12 691-92 (9th Cir. 2003); *Clement v. Gomez*, 298 F.3d 898, 903 (9th Cir. 2002); *Jeffers v. Gomez*, 267
13 F.3d 895, 900 (9th Cir. 2001) (per curiam); *Schwenk v. Hartford*, 204 F.3d 1187, 1196 (9th Cir.
14 2000); *Robins v. Meecham*, 60 F.3d 1436, 1441 (9th Cir. 1995); *Berg v. Kincheloe*, 794 F.2d 457,
15 460 (9th Cir. 1986). When determining whether the force is excessive, the court should look to the
16 "extent of injury . . ., the need for application of force, the relationship between that need and the
17 amount of force used, the threat 'reasonably perceived by the responsible officials,' and 'any efforts
18 made to temper the severity of a forceful response.'" *Hudson*, 503 U.S. at 7 (quoting *Whitley*, 475
19 U.S. at 321); *see also Martinez*, 323 F.3d at 1184. Although the Supreme Court has never required a
20 showing that an emergency situation existed, "the absence of an emergency may be probative of
21 whether the force was indeed inflicted maliciously or sadistically." *Jordan*, 986 F.2d at 1528 n.7;
22 *see also Jeffers*, 267 F.3d at 913 (deliberate indifference standard applies where there is no "ongoing
23 prison security measure"); *Johnson v. Lewis*, 217 F.3d 726, 734 (9th Cir. 2000). Moreover, there is
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1 no need for a showing of serious injury as a result of the force, but the lack of such injury is relevant
2 to the inquiry. *See Hudson*, 503 U.S. at 7-9; *Martinez*, 323 F.3d at 1184; *Schwenk*, 204 F.3d at 1196.
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4 In count I, plaintiff states a colorable Eighth Amendment excessive force claim against all
5 defendants.
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7 In count II, plaintiff alleges that these same factual allegations state a Fourteenth Amendment
8 due process claim (#1-1, p. 6). He contends that each officer breached his duty to protect him.
9 Plaintiff frames count III as a separate Eighth Amendment cruel and unusual punishment claim. *Id.*
10 at 7. Plaintiff's factual allegations do not implicate his Fourteenth Amendment due process rights,
11 and his Eighth Amendment claim is one for excessive force, as set forth in count I. Accordingly,
12 counts II and III should be dismissed for failure to state a claim for which relief may be granted. As
13 amendment of these two counts is clearly futile, they should be dismissed with prejudice and without
14 leave to amend. *See Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995) (citation omitted).
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16 Finally, the court notes that if the District Court adopts this Report and Recommendation, a
17 subsequent order directing service on the defendants shall issue.
18

IV. Conclusion

19 **IT IS THEREFORE RECOMMENDED** that plaintiff's application to proceed *in forma*
20 *pauperis* (#1) without having to prepay the full filing fee be **GRANTED**; plaintiff shall not be
21 required to pay an initial installment fee. Nevertheless, the full filing fee shall still be due, pursuant
22 to 28 U.S.C. § 1915, as amended by the Prisoner Litigation Reform Act of 1996. The movant herein
23 is permitted to maintain this action to conclusion without the necessity of prepayment of fees or
24 costs or the giving of security therefor. This order granting *in forma pauperis* status shall not extend
25 to the issuance of subpoenas at government expense.
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27 **IT IS FURTHER RECOMMENDED** that, pursuant to 28 U.S.C. § 1915, as amended by
28 the Prisoner Litigation Reform Act of 1996, the Nevada Department of Corrections shall pay to the
Clerk of the United States District Court, District of Nevada, 20% of the preceding month's deposits

1 to the account of Jeramie Carlsson, **Inmate No. 87009** (in months that the account exceeds \$10.00)
2 until the full \$350 filing fee has been paid for this action. The Clerk shall send a copy of this order
3 to the attention of the Chief of Inmate Services for the Nevada Department of Corrections, P.O. Box
4 7011, Carson City, NV 89702.

5 **IT IS FURTHER RECOMMENDED** that, even if this action is dismissed, or is otherwise
6 unsuccessful, the full filing fee shall still be due, pursuant to 28 U.S.C. §1915, as amended by the
7 Prisoner Litigation Reform Act of 1996.

8 **IT IS FURTHER RECOMMENDED** that the Clerk shall detach and **FILE** the complaint
9 (#1-1).

10 **IT IS FURTHER RECOMMENDED** that count I of the complaint **SHALL PROCEED**.

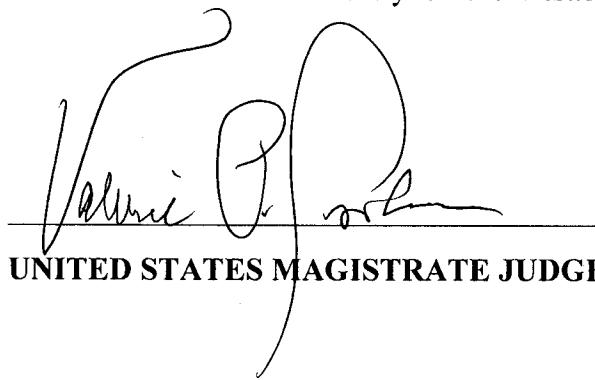
11 **IT IS FURTHER RECOMMENDED** that counts II and III be **DISMISSED** with
12 prejudice and without leave to amend.

14 The parties should be aware of the following:

15 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice, the
16 parties may file specific written objections to this Report and Recommendation within
17 fourteen days of receipt. These objections should be titled “Objections to Magistrate Judge’s
18 Report and Recommendation” and should be accompanied by points and authorities for
19 consideration by the District Court.

22 2. This Report and Recommendation is not an appealable order and any notice of appeal
23 pursuant to Fed.R.App.P. 4(a)(1) should not be filed until entry of the District Court’s
24 judgment.

25 **DATED:** August 28, 2014.



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UNITED STATES MAGISTRATE JUDGE